

site total provided in Section 90.495 of the Commission's rules. This finding is hardly surprising considering that AirTouch filed four hundred and eighty applications for new sites on this frequency at or about the time of this certification.²³ PCIA/NABER omits any mention of the other previously coordinated exclusive systems, including that of API in its coordination. This omission suggests that for unknown reasons PCIA/NABER may have been persuaded to depart from its prior consistent pattern of "coordinated" regional and local systems on 929.4875 MHz. If so, the Commission should not give the certification obtained by AirTouch any weight in these proceedings. As a matter of fair allocation of spectrum rights the Commission should consider that the predominant established pattern of usage on this channel was regional and local--not nationwide.

Based on ex parte assertions by AirTouch, it is also clear that neither Beep Page nor AirTouch had constructed as many as three hundred transmitters on 929.4875 MHz determined on the "single count" basis provided in Section 90.495 of the Commission's rules prior to the February 8, 1996 adoption date of the NPRM.²⁴ This means that the sole basis for AirTouch's claimed "expectancy" to

²³ If the Commission's policy had been that filing for three hundred or more sites on a single channel is the sole criterion for "coordinating" a nationwide allocation, and this policy had been publicly announced prior to the adoption of the Commission's NPRM, we have no doubt that every exclusive PCP channel would have been filed for and the Commission would have had no channels left for non-nationwide licensees.

²⁴ See Ex Parte Notification of Carl W. Northrop dated July 2, 1996, in WT Dkt. 96-18, Page 3. (Attachment C hereto).

obtain nationwide rights on 929.4875 MHz was the last minute filing of a mass of applications which it manufactured in hopes of creating licensing opportunities where rightfully none should exist.

The eleventh hour nature of AirTouch's filings should have raised "red flags" concerning the propriety of its request. If indeed it is the case, as it appears, that AirTouch was "gaming" the Commission's processing procedures to obtain valuable spectrum rights, the Commission should reconsider its eligibility criteria for awarding nationwide exclusivity as well as examine the conduct of AirTouch in these proceedings.

7. The Public Record Lacks Essential Information to Determine Whether AirTouch was Barred from Filing its Request on 929.4875 MHz Under the Commission's Policies Prohibiting Spectrum Hoarding.

The "PCP Exclusivity Request" of AirTouch on 929.4875 MHz on file with the Commission neither states that AirTouch is in compliance with Section 90.495(d) of the Commission's rules nor contains adequate detail to make such compliance ascertainable. In the absence of this fundamental information regarding the eligibility of AirTouch to file its nationwide exclusivity request on 929.4875 MHz, the Commission should rescind AirTouch's grant pending development of an adequate record on which to base a final determination regarding this aspect of its request.

Under Section 90.495(d) of the Commission's rules:

"...No applicant or affiliate of an applicant may apply for an additional frequency in the area that is subject of the applicant's prior application unless the system proposed in the prior appli-

cation has been constructed, is operating, and meets the criteria set forth in paragraph (a) of this section." (Section 90.495(d))

In this case, AirTouch and its affiliates had already made nineteen or possibly more exclusivity requests on 929 MHz channels for overlapping service areas at the time its nationwide request on 929.4875 MHz was submitted. In order to make its nationwide request on 929.4875 MHz, AirTouch was required to have constructed as many as eleven hundred or more transmitters for prior filed exclusive systems under the criteria listed in the foregoing rule.²⁵ See Attachment G hereto.

The PCIA/NABER certification obtained by AirTouch on February 5, 1996, does not state that PCIA/NABER completed any analysis of AirTouch's compliance with Section 90.495(d) of the Commission's rules. The AirTouch PCP exclusivity request on file at the Commission does not state that its request complies with this rule. If indeed this eligibility requirement has not been demonstrated in AirTouch's nationwide request, its request never should have been granted. This is yet another area which should be examined carefully by the Commission on reconsideration with opportunity for comment by interested parties.

Conclusion

We have described in detail the numerous procedural safeguards which the Commission and AirTouch failed to observe regarding the future development of paging systems on 929.4875 MHz. In its single-minded pursuit of a fourth

²⁵ We estimate that this number exceeds 1,100, but AirTouch should be required to provide full details under oath.

nationwide PCP license grant, AirTouch filed hundreds upon hundreds of applications at the eleventh hour in hopes of windfall gains. It trampled on the rights of others who did not know that the Commission's NPRM was about to be adopted and that the filing of applications before that adoption date could be tactically significant. It failed to disclose its pending request on the record so that the comment and reply comment dates in this proceeding came and went without meaningful opportunity for public comment. It conducted ex parte meetings with Commission staff and advisors to Commissioners, without opportunity for affected parties like API to be present and comment. This record and the corresponding failure of the Commission to give notice that nationwide grant on 929.4875 MHz was under consideration reflects egregious prejudicial error which must be rectified.

We have requested rescission of nationwide grant to AirTouch ab initio because of the great difficulty in expunging from the memories of the numerous Commission staff members the uncontested presentations made by AirTouch in support of its nationwide exclusivity request. We have suggested reopening the record in these proceedings because this appears to be the only practical method to solicit appropriate public comment. We request that the following areas of factual inquiry regarding eligibility under Section 90.495(d) of the Commission's rules, the circumstances of AirTouch's eleventh hour filings and the anti-competitive impact of its nationwide request because these appear to raise substantial and material considerations which may help the Commission decide that AirTouch's request should be dismissed:

- Whether the proposed exclusion of 929.4875 MHz from the Commission's geographic licensing plan should be denied as fundamentally inconsistent with the Commission's procompetitive goals.
- Whether AirTouch failed to establish its eligibility under Section 90.495(d) of the Commission's rules when it applied for nationwide exclusivity on February 5, 1996; and
- Whether in consideration of the unique circumstances surrounding the last-minute filing of AirTouch's request, it should be subject to special scrutiny to determine the overall compliance of this filing with the Commission's rules and policies.

If the Commission finds as we believe it should that the AirTouch request should be dismissed, geographic license selection on 929.4875 MHz under competitive bidding should be used to assure a competitively fair selection process.

Respectfully submitted,

AMERICAN PAGING, INC.

By /s/ George Y. Wheeler
George Y. Wheeler

Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Suite 1000
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(202) 467-5700

Its Attorneys

March 26, 1997

ATTACHMENT A

DECLARATION

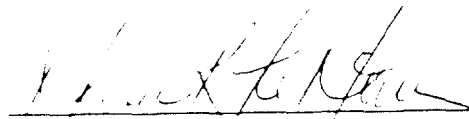
I, Dean R. LeDour, hereby declare under penalty of perjury that the following is true and correct:

1. I am the Corporate Development Manager and responsible for regulatory affairs for American Paging, Inc. ("API").

2. Under the recently adopted rules limiting expansion systems to paging geographic area licensees, Section 22.503(f) of the Commission's Rules, non-geographic licensees will not be able to shift the locations of any transmitter site which has an interference contour on the outer perimeter of its composite interference contour without diminishing its authorized service area. This is true because interference contours must be calculated using the fixed mileage criteria as provided in Section 22.537.

3. Based on my review of available records disclosing spectrum usage in the 929 MHz and 931 MHz bands, I have determined that there is no unlicensed spectrum available in either of these bands which API could acquire at auction to be able to replace the coverage of API's existing one hundred and four station network on 929.4875 MHz so that it can expand that coverage on a co-channel basis.

4. I have estimated the capital costs expended by API for the 929 MHz radio frequency facilities comprising API's existing network on 929.4875 MHz at approximately \$1.9 million. When the cost of terminal equipment, network trunking and backhaul facilities and essential working capital are included, the total commitment of API for this network is substantially in excess of the foregoing amount.


Dean R. LeDour

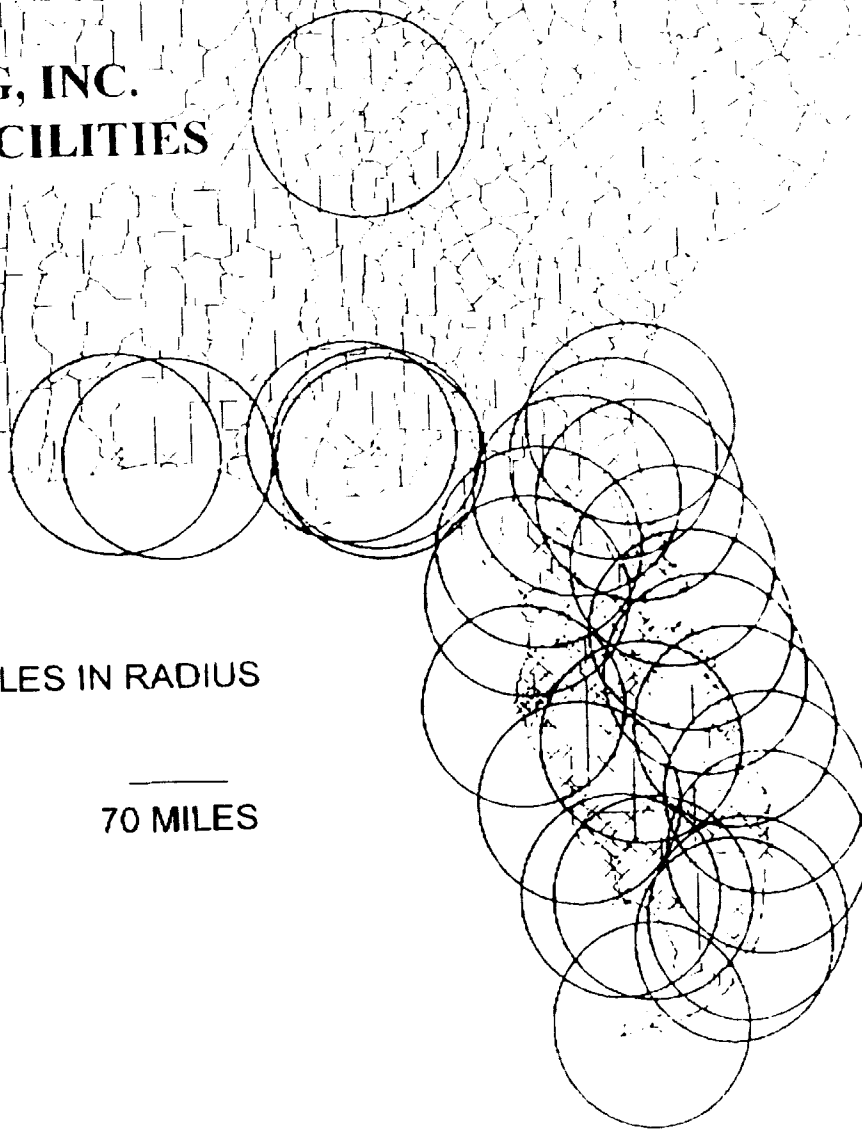
March 21st, 1997

ATTACHMENT B

AMERICAN PAGING, INC.
929.4875 LICENSED FACILITIES

ALL CIRCLES ARE 70MILES IN RADIUS

—
70 MILES



ATTACHMENT C

DUPLICATE

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July 2, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OUR FILE NO
25101.74560

WRITER'S DIRECT DIAL NUMBER

(202) 508-9570

VIA MESSENGER

Mr. William F. Caton
Acting Secretary
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Notice of Ex Parte Contact
WT Docket No. 96-18

Dear Mr. Caton:


On July 1, 1996, Kathleen Abernathy, Mark Stachiw and Carl Northrop, representing AirTouch Paging, and Audrey Rasmussen, representing PageMart II, met in three separate meetings with David Furth and Mika Savir of the Commercial Wireless Division, Rudy Baca of Commissioner Quello's Office and Suzanne Toller of Commission Chong's Office to discuss the transition rule for PCP nationwide exclusivity under consideration in WT Docket No. 96-18.

The enclosed hand-out outlining the presentation topics was distributed. A copy also was delivered to Michelle Farquhar.

PAUL, HASTINGS, JANOFSKY & WALKER
Mr. William F. Caton
July 2, 1996
Page 2

Kindly refer any questions in connection with this
matter to the undersigned.

Very truly yours,


Carl W. Northrop
of PAUL, HASTINGS, JANOFSKY & WALKER

Enclosure

cc: David Furth
Mika Savir
Rudy Baca
Suzanne Toller

**Presentation of AirTouch Paging
and PageMart II**

(WT Docket No. 96-18)

JULY 1, 1996

AirTouch Paging has Substantial Operations on 929.4875 MHz that are Entitled to Nationwide Exclusivity Protections

- AirTouch's predecessor in interest (Beep Page) qualified for regional exclusivity on a grandfathered basis on 929.4875 MHz
- AirTouch acquired Beep Page on December 14, 1995 pursuant to FCC consent
- Prior to February 8, 1996 (the Freeze Date), AirTouch filed for nationwide exclusivity on 929.4875 MHz
- Prior to the Freeze Date, PCIA forwarded the AirTouch applications and exclusivity request to the FCC with a favorable recommendation

JULY 1, 1996

- AirTouch now holds authorizations for approximately 435 facilities on 929.4875 MHz throughout the nation
- AirTouch has completed construction of 378 licensed sites on 929.4875 MHz and 53 additional sites pursuant to preoperation authority for a total of 431 operating locations
- All construction has been completed within initial CP deadlines
- AirTouch is continuing to build out the channel by virtue of 76 additional licensed locations and 397 coordinated applications that pre-dated the freeze
- AirTouch currently serves over 100,000 subscribers on this channel
- On a single count basis, AirTouch will meet all nationwide exclusivity requirements set forth in Section 90.495 of the rules by July 31, 1996

PageMart Has Substantial Operations on 929.7625 MHz that are Entitled to Nationwide Exclusivity Protections

- PageMart filed over 400 transmitter site applications by March 15, 1994, at which time PageMart requested coordination by NABER of a nationwide exclusive paging frequency
- In May, 1994 PageMart's applications were filed with the FCC as coordinated on 929.7625
- As of December 1, 1994, 929.7625 was included on PCIA's 929 Exclusivity Master List. The FCC began granting licenses to PageMart on 929.7625 in December 1994, and PageMart began construction of its network on the frequency

- In October, 1994 Electronic Engineering Company filed a Petition to Dismiss with the FCC challenging PageMart's nationwide exclusivity on 929.7625. On June 1, 1995 the FCC denied the Petition to Dismiss and upheld PageMart's nationwide exclusivity request on 929.7625
- Consistent with its business plan, PageMart continued to build out the 929.7625 frequency in compliance with the requirements of the construction permits
- On May 10, 1996 the FCC released a Public Notice listing those frequencies that had qualified for nationwide exclusivity and thus would be exempt from the paging freeze and geographic licensing. PageMart's previously coordinated 929.7625 MHz was not on the list
- On May 15, 1996, PageMart filed a notice with the FCC that it had constructed and was broadcasting on 364 transmitters

JULY 1, 1996

The Commission's Rules Specifically Provide that Exclusivity Rights Vest at the Time of Licensing, Subject to Divestments in the Absence of Construction

- Section 90.495(c) provides:

A proposed paging system that meet the criteria for channel exclusivity under paragraph (a) of this section will be granted exclusivity under this section at the time of initial licensing. Such licensing will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within [the construction deadline]. (Emphasis Added)

The Public Interest Will be Served by Granting Exclusivity to Carriers that Build Compliant Systems Based on Pre-Freeze Applications

- The same public interest benefits that caused the Commission to grant nationwide exclusivity in the first place still apply.
Exclusivity:
 - creates additional competition for nationwide services
 - incents carriers to make investments in nationwide systems
 - recognizes that nationwide systems are incremental in nature and need to continue to be built out after initial investment
- The existing rules have never settled and have been in existence less than 3 years

- Retroactive rulemaking is not favored
- Divestment of nationwide status would be considered a "taking"
- FCC's auction authority was not intended to require incumbents to purchase at auction operating rights previously granted under existing rules

CONCLUSION

The FCC should accord nationwide exclusivity to 929 MHz operations who build compliant systems based upon pre-freeze filings

ATTACHMENT D

EX PARTE OR LATE FILED

ORIGINAL

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August 15, 1996

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VIA MESSENGER

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Re: Notice of Ex Parte Contact
WT Docket No. 96-18

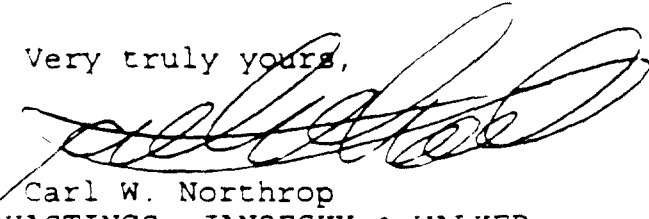
Dear Mr. Caton:

On August 15, 1996, Kathleen Abernathy, Mark Stachiw and Carl Northrop, all representing AirTouch Paging, met in three separate meetings with (i) Kathleen Ham, Amy Zoslov, Frank Stillwell and Brett Tarnutzer of the Auctions Division, (ii) Jackie Chorney of Chairman Reed Hundt's office and (iii) Jennifer Warren, David Furth and Mika Savir of the Wireless Telecommunications Bureau to discuss market area licensing procedures for paging services under consideration in WT Docket No. 96-18.

The enclosed hand-out outlining the presentation topics was distributed.

Kindly refer any questions in connection with this matter to the undersigned.

Very truly yours,


Carl W. Northrop
of PAUL, HASTINGS, JANOFSKY & WALKER

Enclosure

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AUG 15 1996

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OFFICE OF SECRETARY

OUR FILE NO

25101.74560

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PAUL HASTINGS, JANOFSKY & WALKER LLP

Mr. William F. Caton
August 15, 1996
Page 2

cc: Kathleen O'Brien Ham
Amy Zoslov
Frank Stillwell
Brett Tarnutzer
Jackie Chorney
Jennifer Warren
David Furth
Mika Savir
Kathleen Abernathy

**Presentation of AirTouch Paging
on Market-Area Licensing
Procedures for Paging Services**

(WT Docket No. 96-18)

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AUGUST 15, 1996